(1)

Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

STEVEN A. RHOADS,

Petitioner,

v.

THE BOARD OF TRUSTEES OF THE CITY OF CALUMET CITY POLICEMEN'S PENSION FUND,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution protects the petitioner's property right to a 50% non-duty police disability pension because the petitioner is disabled notwithstanding his physical ability to function as a police chief, as a light-duty position has not been made available to him.

2. Whether the petitioner's having been discharged prior to his receiving a 50% non-duty police disability pension deprives him of his entitlement to continue receiving his disability benefits.

LIST OF ALL PARTIES

The petitioner to this Honorable Court for writ of certiorari is Steven A. Rhoads, who was formerly a police chief of the City of Calumet City, Illinois, before being awarded a 50% non-duty disability pension by the Board of Trustees of City of Calumet City Policemen's Pension Fund.

The respondent is the Board of Trustees of the City of Calumet City Policemen's Pension Fund.

CORPORATE DISCLOSURE

Petitioner is an individual with no corporate parent or subsidiary requiring disclosure pursuant to Supreme Court Rule 29.6.

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OPINIONS BELOW

On June 27, 2003, the Circuit Court of Cook County, Illinois, reversed the decision of the Board of Trustees of the City of Calumet City Policemen's Pension Fund, revoking the petitioner's 50% non-duty police disability pension. (App. 17-27)

On May 20, 2004, the Appellate Court of Illinois, First Judicial District, Fourth Division, reversed the trial court's decision, which had reversed the Board of Trustees of the City of Calumet City Policemen's Pension Fund in revoking the petitioner's 50% non-duty police disability pension. (App. 2-16)

On October 6, 2004, the Supreme Court of Illinois denied the petitioner's Petition for Leave to Appeal. (App. 1)

STATEMENT OF JURISDICTION

1. The published opinion of the Illinois Appellate Court, First District, Fourth Division (App. 2-16), was entered on May 4, 2004. That opinion reversed the circuit's ruling (App. 17-27), which had reversed the respondent's decision to revoke the petitioner's property right to his 50% non-duty police disability pension, said property right protected by the Fifth and Fourteenth Amendments to the United States Constitution.

2. The Illinois Supreme Court denied a petition for leave to appeal on October 6, 2004. (App. 1)

3. The Petition for Writ of Certiorari was filed less than 90 days from the denial of the Petition for Leave to Appeal by the Supreme Court of Illinois, said denial occurring on October 6, 2004.

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V to the Constitution of the United States

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV to the Constitution of the United States

§1. Citizenship rights not to abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

40 ILCS 5/3-114.2 of the Pension Code

Disability pension—Not on duty. A police officer who becomes disabled as a result of any cause other than the performance of an act of duty, and who is found to be physically or mentally disabled so as to render necessary his or her suspension or retirement from police service in the police department, shall be entitled to a disability pension of 50% of the salary attached to the officer's rank on the police force at the date of suspension of duty or retirement. 40 ILCS 5/3-114.2

Section 40 ILCS 5/3-116 of the Pension Code

Examination and emergency service. A police officer whose duty is suspended because of disability may be summoned to appear before the board, and to submit to an examination to determine fitness for duty. The officer shall abide by the board's decision. If a police officer retired for disability, except one who voluntarily retires after 20 years' service, is found upon medical examination to have recovered from disability, the board shall certify to the chief of police that the member is no longer disabled and is able to resume the duties of his or her position. In case of emergency, a disabled police officer may be assigned to and shall perform such duty without right to compensation as the chief of police or chief officer of the municipality may direct. 40 ILCS 5/3-116.

STATEMENT OF THE CASE

Steven A. Rhoads was the Calumet City Chief of Police. (C523). During an election year, the mayoral challenger made it be known that if he were elected Rhoads would not be reappointed as Chief of Police. The challenger won and Rhoads was not reappointed as Chief of Police. (C378).

On May 11, 1993, two days prior to Rhoads' separation from the Calumet City Police Department, Rhoads filed an application for a duty-related disability pension. On January 31, 1995, the Calumet City Police Pension Board granted the petitioner a non-duty related disability pension pursuant to 40 ILCS 5/3-114.2 of the Illinois Pension Code. Rhoads then filed a complaint for administrative review seeking a line-of-duty disability related pension. The Circuit Court reversed the Pension Board's decision denying a line-of-duty disability pension. On appeal, the Appellate Court affirmed the decision of the Pension Board. (C677-C682). In that decision, the Appellate Court noted that Rhoads was discharged from his position as Chief of Police. (C682).

The petitioner performed as a rodeo clown in some rodeo events in 1998. The attorney for the Pension Board hired an investigative firm to undertake video surveillance of the petitioner. (C180). The petitioner was videotaped at rodeos in 1998. (C179). The Pension Board then had the petitioner examined by Dr. William C. Malik. On March 6, 2000, Dr. Malik concluded that Rhoads would be disabled from full duty employment as a police officer. (C563). Dr. Malik, after viewing the clowning videos in question, stated that Rhoads could return as a supervisory law enforcement officer, with medium workload activities, lifting up to 50 pounds maximum, with frequent lifting or carrying up to 25 pounds. (C563). On March 29, 2001, Dr. Miller evalu-

ated Rhoads and determined that Rhoads was definitely disabled, even after viewing the videotape. (C566).

The Pension Board convened an administrative hearing on July 18, 2001. (C119). The participants and beneficiaries of the Calumet City Policemen's Pension Fund were not parties to this administrative proceeding. (Vol. 4, pgs. 14-16). At the hearing, the medical reports of Dr. Malik and Dr. Miller were made part of the administrative record. (C177). Also admitted into evidence (Exhibit H) was an edited videotape filmed by Richard Cyr, a private investigator, showing the petitioner performing as a rodeo clown. (C212). The edited videotape was viewed by the Pension Board. (C219). Richard Cyr was never formally trained to be a camera operator. (C186). Richard Cyr's camera did not bear a time stamp, nor was he aware what the custom and practice of the industry was for bearing a time and date stamp. (C197). Richard Cyr was not aware of the presence of chiropractors at the Buffalo, Minnesota rodeo. (C191). The edited videotape does not show the petitioner running. (C374). The edited videotape does not show the petitioner jumping into a barrel. (C374). The edited videotape shows the petitioner having to pull himself into, and pry himself out of a barrel. (C374).

George Vallis, the current Chief of Police for Calumet City, testified that there is no light duty whatsoever in the Calumet City Police Department. (C332). George Vallis testified that Rhoads' disability is of such nature that he could not be hired by the Calumet City police department. (C339). George Vallis testified that according to the rules and regulations and the mission statement of the Calumet City Police Department, the Chief of Police must be able to perform the functions of a full-time police officer without any question, and therefore Rhoads would not be eligible to perform any kind of full-time functions, whether that be of Chief of Police or of a patrol officer. (C337-C339).

On March 15, 2002, the Pension Board issued a written decision terminating the petitioner's disability pension pursuant to 40 ILCS 5/3-116. (C106-C115, C117). The Board based its decision upon what was shown in the videotape and the medical evidence submitted by Dr. Malik and Dr. Miller. (C111, C112). Dr. Malik concluded that Rhoads would be disabled from full duty employment as a police officer. (C563). Dr. Miller evaluated Rhoads and determined that Rhoads was definitely disabled, even after viewing the videotape. (C566).

The Pension Board found that the chief's position formerly held by Rhoads was administrative in nature and that the petitioner was physically able to perform his former position. (C114). George Vallis, the current Chief of Police for Calumet City, testified that according to the rules and regulations and the mission statement of the Calumet City Police Department, the Chief of Police must be able to perform the functions of a full-time police officer, and therefore Rhoads would not be eligible to perform any kind of full-time functions, whether that be of Chief of Police or of a patrol officer. (C337-C339). The Pension Board also concluded that whether or not a current position is available to Rhoads in the police department was not relevant to the issue of whether or not Rhoads recovered from his disability. (C115). The Circuit Court determined whether a current position was available to Rhoads was relevant and that the petitioner was disabled notwithstanding his physical ability to function as police chief since that position has not been made available to him (C721). The Circuit Court held that the Pension Board's decision to terminate the petitioner's disability pension must be reversed as contrary to law and that the petitioner was entitled to continue receiving disability benefits. (C721).

REASONS FOR GRANTING THE WRIT

I.

THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PROTECTS THE PETITIONER'S PROPERTY RIGHT TO A 50% NON-DUTY POLICE DISABILITY PENSION BECAUSE THE PETITIONER IS DISABLED NOTWITHSTANDING HIS PHYSICAL ABILITY TO FUNCTION AS A POLICE CHIEF, AS A LIGHT-DUTY POSITION HAS NOT BEEN MADE AVAILABLE TO HIM.

The Fifth and Fourteenth Amendments to the United States Constitution protect property rights, pursuant to the analysis in *Nowak v. City of Calumet City*, 648 F.Supp. 1557 (N.D. Ill. 1986), at 1561:

> As we observed earlier, a property interest may arise from rules or understandings which have less formality than a state statute or municipal ordinance. Indeed, in the absence of such provisions, extrinsic evidence of a rule, policy or practice upon which legitimate expectation of continued employment can be based may provide the legal basis for the property interest. *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1263 (7th Cir. 1985), *Kufalk v. Hart*, 610 F.Supp. 1178, 1190 (N.D. Ill. 1985). See also *Hermes v. Hein*, 742 F.2d 350, 354-55 (7th Cir. 1984) (property interest in promotion may arise out of a de facto promotional program); *Begg v. Moffitt*, 555 F.Supp. 1344 (N.D. Ill. 1983) (property interest in outside, part-time employment arose out of long-standing custom and practice).

In this instance, a property right was created by Illinois statute, 40 ILCS 5/3-114.2 of the Pension Code, governing a non-duty disability pension, which provides:

> Disability pension—Not on duty. A police officer who becomes disabled as a result of any cause other than the performance of an act of duty, and who is found to be physically or mentally disabled so as to render necessary his or her suspension or retirement from police service in the police department, shall be entitled to a disability pension of 50% of the salary attached to the officer's rank on the police force at the date of suspension of duty or retirement. 40 ILCS 5/3-114.2.

Section 40 ILCS 5/3-116 of the Pension Code, governing examination and emergency service, provides:

> Examination and emergency service. A police officer whose duty is suspended because of disability may be summoned to appear before the board, and to submit to an examination to determine fitness for duty. The officer shall abide by the board's decision. If a police officer retired for disability, except one who voluntarily retires after 20 years' service, is found upon medical examination to have recovered from disability, the board shall certify to the chief of police that the member is no longer disabled and is able to resume the duties of his or her position. In case of emergency, a disabled police officer may be assigned to and shall perform such duty without right to compensation as the chief of police or chief officer of the municipality may direct. 40 ILCS 5/3-116.

Just as a police officer must establish his entitlement to a disability pension through medical examination verifying his continued disability, an officer's recovery from disabil-

ity, warranting revocation of pension, must also be shown by medical examination. *Martino v. Police Pension Board of City of Des Plaines*, 331 Ill.App.3d 975, 981, 772 N.E.2d 289 (1st Dist. 2002). In *Martino v. Police Pension Board of City of Des Plaines*, the Police Pension Board of the City of Des Plaines appealed the order of the circuit court reversing the board's order terminating the disability pension of plaintiff, Mark Martino. *Id.* at 976. On appeal, the board argued that plaintiff was no longer disabled for purposes of receiving a disability pension, as evidenced by the fact that plaintiff currently works full time for another police department. *Id.* at 976. The appellate court affirmed the decision of the circuit court concluding that the board erroneously decided to revoke Martino's disability pension. As the basis for its decision, the appellate court, in *Martino v. Police Pension Board of City of Des Plaines*, on page 981, states:

> Here, plaintiff introduced medical evidence from Doctors Khan and McNaughton showing that plaintiff continues to suffer from his disability, i.e., the right foot drop occurring as a complication of spinal stenosis and herniated disk. The Board offered no contrary medical evidence and, in fact, conceded during oral argument that plaintiff continues to suffer from his disability and that, as long as he is so disabled, he will not be rehired by the Des Plaines police department. Since plaintiff has not recovered from his disability, the Board erred in revoking his disability pension.

In *Antonelli v. Board of Trustees of the Hillside Police Pension Board*, 287 Ill.App.3d 348, 678 N.E.2d 773 (1st Dist. 1997), the appellate court concluded that the decision of the pension board to revoke the disability pension of Officer Antonelli was not against the manifest weight of the evidence since the pension board determined, based

upon medical testimony, that Officer Antonelli had fully recovered from his disability and was physically fit to return to the duties of a full-time police officer.

Based upon the standards set forth in *Martino v. Police Pension Board of City of Des Plaines* and *Antonelli v. Board of Trustees of the Hillside Police Pension Board*, the pension board in the instant case erroneously revoked Officer Rhoads' disability pension because, under 40 ILCS 5/3-116, the medical examination and testimony establish that Rhoads remains disabled. On March 29, 2001, Dr. Miller evaluated Rhoads and determined that Rhoads was definitely disabled, even after viewing the videotape (C566). On March 6, 2000, Dr. Malik concluded that Rhoads would be disabled from full duty employment as a police officer (C563). Dr. Malik, after viewing the clowning videos in question, stated that Rhoads could return as a supervisory law enforcement officer, with medium work-load activities, lifting up to 50 pounds maximum, with frequent lifting or carrying up to 25 pounds (C563).

Significantly, George Vallis, the current chief of police for Calumet City, testified that there is no light duty whatsoever in the Calumet City police department (C332), and that Rhoads' disability is of such nature that he could not be hired by the Calumet City police department. (C339). In addition, although Vallis testified that as a chief of police his position is more administrative, as an administrator, according to the rules and regulations and the mission statement of the Calumet City police department, a police chief must be able to perform the functions of a full-time police officer without any question, and therefore Rhoads would not be eligible to perform any kind of full-time functions, whether that be of chief or of a patrol officer (C337-C339).

Consequently, under 40 ILCS 5/3-116 of the Pension Code, and pursuant to *Martino v. Police Pension Board of City of Des Plaines,* and *Antonelli v. Board of Trustees of the Hillside Police Pension Board,* the standard governing the revocation of a pension is that the revocation of a pension must be based on medical examination and testimony. The medical examination and testimony of Dr. Malik and Dr. Robert Miller do not provide a basis for the revocation of Rhoads' disability pension. Both Dr. Malik and Dr. Robert Miller concluded that Rhoads could not perform the duties of a full-time police officer, except in a supervisory capacity. However, there is no supervisory position available on the Calumet City police department.

Very importantly, in *Martino v. Police Pension Board of City of Des Plaines,* the appellate court, on pages 982 and 983, specifically states:

> Thus, for purposes of plaintiff's disability pension, his job as a police officer in the second police department is no different than if he had taken a job as a real estate agent; despite working for the second police department, he is still disabled according to the requirements of the first police department, and therefore he is still entitled to his disability pension.

As a consequence, the medical testimony that Rhoads could perform supervisory duties does not provide a basis for revoking his disability pension, since there was no light duty available, which could have been a basis to revoke the petitioner's non-duty related disability pension.

II.

THE PETITIONER'S HAVING BEEN DISCHARGED PRIOR TO HIS RECEIVING A 50% NON-DUTY POLICE DISABILITY PENSION DOES NOT DEPRIVE HIM OF HIS ENTITLEMENT TO CONTINUE RECEIVING HIS DISABILITY BENEFITS.

With reference to the discharge issue, at App. 13 of the appellate court opinion, the following language is quoted, upon which the appellate court relies for reversing the trial court.

> The Board's certification under section 3-116 "does not require the pensioner to be returned to duty, nor does it provide an absolute right to his or her old position." *Greenan*, 213 Ill.App.3d at 185, 573 N.E.2d at 829. Additionally, the *Greenan* court found that even though a police officer's resignation from the police department did not bar his right to a disability pension, that officer would not be entitled to a pension if he was not disabled. *Greenan*, 213 Ill.App.3d at 187, 573 N.E.2d at 830. The fact that an officer was discharged precludes the possibility of any reinstatement. *Freberg v. Board of Trustees of the Firemen's Pension Fund*, 128 Ill.App.3d 369, 374, 262 N.E.2d 22, 25 (1970).

Analyzing the above language of the appellate court, the petitioner contends that, although his discharge would preclude the possibility of any reinstatement pursuant to *Freberg v. Board of Trustees of the Firemen's Pension Fund*, 128 Ill.App.3d 369, 374, 262 N.E.2d 22, 25 (1970), it should be emphasized, in this matter, that the medical evidence of the pension doctors, Dr. Malik and Dr. Miller, was that the petitioner was disabled from full duty

employment as a police officer, with the consequence that he could never be reinstated as chief of police, thereby negating the applicability of *Freberg v. Board of Trustees of the Firemen's Pension Fund.*

Furthermore, at App. 11-12 of the appellate court opinion, its analysis of the City of Calumet City ordinance code number 20-6 outlined the chief's duties as those of a supervisory nature, not requiring physical demands. For purposes of emphasis, there was no light duty available in the department for the position of Chief of Police, pursuant to testimony of George Vallis, current chief of police of Calumet City, based upon the rules and regulations and the mission statement of the Calumet City police department, which would require that the chief of police perform the functions of a full-time police officer, with no light duty being contemplated.

As was so clearly stated in *Thurow v. Police Pension Board of Village of Fox Lake,* 180 Ill.App.3d 683, 536 N.E.2d 155 (2nd Dist. 1989), specifically on pages 691 and 692, when the appellate court remanded to the circuit court for the purpose of ascertaining if a light duty position were available, the purpose of the remand was to provide either for a pension or for no pension on the basis of the availability of light duty.

In reversing the trial court, the appellate court discounted the trial court's reliance upon certain case law, which case law will be cited by the petitioner herein, in this petition for writ of certiorari, not involving police officers who could not be reinstated to their former positions.

However, the cited case law hereinafter is pertinent in that, unless there is a light duty position available, a disability pension cannot be revoked.

In *Iwanski v. Streamwood Police Pension Board*, 232 Ill.App.3d 180, 596 N.E.2d 691 (1st Dist. 1992), Officer Iwanski filed an application for a disability pension with the Streamwood Police Pension Board prior to being discharged from the police force. The board asserted that in order to be eligible for a disability pension, the applicant must be a police officer at the time of the application as well as the receipt of benefits. *Id.* at 188. According to the board, the crucial factor was not the time of the application, but rather, the effect of the discharge on the right to receive disability benefits. *Id.* at 188.

In response, Iwanski relied on the authority of *Stec v. Oak Park Police Pension Board* (1990), 204 Ill.App.3d 556, 149 Ill.Dec. 538, 561 N.E.2d 1234, in which the court held that a police officer who applied for a duty-related disability pension after disciplinary charges were filed against him, but before tendering his resignation and reserving his right to pursue a disability pension, was not precluded from receiving a disability pension since, unlike DiFalco, he was a police officer at the time he applied for the pension. *Id.* at 189. The appellate court concluded that Iwanski's discharge did not prevent him from being awarded his disability pension. As the basis for its decision, the appellate court, in *Iwanski v. Streamwood Police Pension Board*, on pages 190 and 191, states:

> In light of the foregoing authorities and the facts of this case we find that Iwanski's discharge does not prevent his being awarded a disability pension. We disagree with the Board's claim that *Hahn* and *Stec* are distinguishable because the plaintiffs in those cases resigned whereas in this case Iwanski was discharged. Furthermore, our holding is not inconsistent with the provisions of the Code cited by the Board. In *Greenan* the court noted that,

> unlike fire fighters, "police officers on disability pension are not subject to recall to active duty upon recovery from their disability."
>
> ***
>
> Similarly, with respect to section 3-116 of the Code, which requires that a pensioner is subject to recall for emergency duty and is required to submit to annual examinations, the court in *Greenan* stated, on the authority of *Hahn*, that "these obligations do not arise from plaintiff's employment status with the police department but rather from the Board's jurisdiction over one receiving disability pension benefits."

In *Greenan v. Board of Trustees of Police Pension Fund of Springfield*, 213 Ill.App.3d 179, 573 N.E.2d 825 (4th Dist. 1991), the police officer resigned after applying for duty-related disability benefits. As the basis for its decision that the police officer was not prevented from receiving his duty-related disability pension by his resignation, the appellate court, on page 187, states:

> We agree with *Hahn* and hold that plaintiff continues to be bound by the obligations imposed by section 3-116 of the Code: to submit to medical examinations and be subject to recall in times of emergency. He has indicated he is ready, willing, and able to comply with all the obligations imposed by the Code. These obligations do not arise from plaintiff's employment status with the police department but rather from the Board's jurisdiction over one receiving disability pension benefits. If plaintiff refuses to comply with the Code's provisions, the Board may terminate his benefits.

> The Board argues the Code confers no discretionary powers upon it. However, it acknowledges the "pension fund is a public trust and must be administered by its trustees as a sacred fund for the benefit of all of its eligible members as the legislature has prescribed its terms and conditions."

Significantly, Rhoads filed his application for a disability pension before he was removed from his position as chief of police. The *Greenan v. Board of Trustees of Police Pension Fund of Springfield* case, which is referenced in *Iwanski v. Streamwood Police Pension Board*, supports the petitioner's position that his non-duty disability pension could not be revoked on the basis of the availability of a light duty position when no light duty position in fact existed, pursuant to the testimony of the current police chief George Vallis of the Calumet City police department.

In *Thurow v. Police Pension Board of Village of Fox Lake*, 180 Ill.App.3d 683, 536 N.E.2d 155 (2nd Dist. 1989), the appellate court did not agree with the board's determination that Officer Thurow's pension should be denied because he was employed as a security guard and salesman and played golf, since this was not indicative of whether he could perform the duties required of a police officer. *Id.* at 690. Officer Thurow testified at the pension hearing that he was willing to work for the police department in a light duty position. *Id.* at 690. However, Officer Thurow noted that he was not offered a light duty position. *Id.* at 690. Thus, Officer Thurow concluded that such a position was not available to him and therefore he was entitled to a disability pension because he could not perform the duties of a full time patrolman. *Id.* at 690. Whether or not a light duty position with the police department was available had yet to be determined and was the nexus of disagreement between the parties. *Id.* at 690.

Importantly, relative to Officer Rhoads' contention that his non-duty related disability pension could not be revoked as there was no light duty position available justifying the revocation of his non-duty disability pension, pursuant to the testimony of George Vallis, current chief of the City of Calumet City police department, that testimony is extremely significant from the viewpoint of the appellate court in *Thurow v. Police Pension Board of Village of Fox Lake*, on page 690:

> Officer Thurow's final contention is that the Board's decision was against the manifest weight of the evidence because the evidence showed that he was not capable of fully performing his duties as a police officer. In addition, he notes that there was no evidence presented at the pension hearing to indicate the availability of any light-duty positions in the department as determined by the Board. He thus concludes that he is caught in a "catch-22" position because both the police department and the Board are disclaiming any further responsibility to him. We agree that plaintiff is in a "catch-22" position.

The analysis by the appellate court in *Thurow v. Police Pension Board of Village of Fox Lake* fully supports Officer Rhoads' contention that his disability pension could not be revoked by the Pension Board without his being offered a position on the Calumet City police department. To support this contention, the appellate court, in *Thurow v. Police Pension Board of Village of Fox Lake*, specifically states, on pages 691 and 692:

> We find the holding in *Peterson* to be persuasive as to Officer Thurow's pension application. We can find nothing in the record to determine whether there are any light-duty positions available in the

Fox Lake police department. Officer Thurow testified that he worked for six weeks in a light-duty position in the police department after he returned from his initial layoff. He also testified that he was willing to return to the police department to work in a similar position. However, he notes that he was never offered such a position, nor is he aware that any such position exists. Thus, in the absence of any evidence in the record to determine the availability of such a position, we are faced with the same situation as was the *Peterson* court. Accordingly, we believe that this case must be remanded to the circuit court to determine whether such a position actually exists. We believe there is insufficient evidence in the record to support the Board's finding that a light-duty position was actually available to plaintiff. In this regard, the Board's decision is against the manifest weight of the evidence.

***

For the above reasons, we reverse the decision of the circuit court of Lake County and remand the case to the circuit court for the purpose of ascertaining if a light-duty position is now available. The circuit court is directed that if a firm offer is made to plaintiff within a reasonable period of time of a position comparable in working conditions, compensation and tenure to the light-duty job previously assigned to him, the decision of the Board is to be upheld. The circuit court shall fix a reasonable period of time to determine if a position is or is not available. If the court finds that there is not such a position offered within a reasonable period of time, the court shall reverse the decision of

> the Board and enter the appropriate orders to effectuate the disability pension.

In *Peterson v. Board of Trustees of Firemen's Pension Fund of City of Des Plaines*, 54 Ill.2d 260, 296 N.E.2d 721 (1973), Richard Peterson applied to the Board of Trustees of the Firemen's Pension Fund of the City of Des Plaines, Illinois, for a disability pension. *Id.* at 261. Following a hearing, the board entered an order denying the application. *Id.* at 261. Peterson filed a complaint under the Administrative Review Act in the circuit court of Cook County to review the decision of the board. *Id.* at 261. The circuit court reversed the decision of the Board of Trustees of the Firemen's Pension Fund, and remanded the case back to the board with instructions to grant Peterson a service connected disability pension. *Id.* at 261. On appeal by the City of Des Plaines, the appellate court for the First District reversed the circuit court of Cook County and the Supreme Court granted leave to appeal. *Id.* at 261.

The Supreme Court determined that there was sufficient evidence in the record to support the conclusion of the board that a position in the fire prevention bureau was available for Peterson and that he was physically capable of performing the duties of this position. *Id.* at 263. Significantly, in *Peterson v. Board of Trustees of Firemen's Pension Fund of City of Des Plaines*, the Supreme Court concluded that if a position comparable in working conditions, compensation and tenure to the one previously open to Peterson was not offered to Peterson within a reasonable time fixed by the circuit court, then the judgment of the circuit court remanding and instructing the board to grant the duty-related pension to Peterson was to remain in force. In *Peterson v. Board of Trustees of Firemen's Pension Fund of City of Des Plaines*, the Supreme Court, on pages 265 and 266, specifically states:

> Several years have passed since the Board made its finding that a position is available in the fire-prevention bureau of the fire department. We do not know if the position or a comparable one is available in the fire department at this time. We therefore approve of the procedure outlined by the appellate court in this case wherein it remanded the cause to the circuit court of Cook County for the purpose of ascertaining if such a position is now available, and directed that if a firm offer is made to Peterson of a position comparable in working conditions, compensation and tenure to the one previously open to him, the judgment of the circuit court is to be vacated and the decision of the Board of Trustees upheld. It further held that if within a reasonable time to be fixed by the circuit court, such a position is not offered to Peterson the judgment of the circuit court of Cook County is to remain in force.

As a consequence, under Illinois law, the analysis and decision by the Supreme Court in *Peterson v. Board of Trustees of Firemen's Pension Fund of City of Des Plaines* establishes that the decision of the pension board must be reversed and the court must enter orders to effectuate Officer Rhoads' non-duty related disability pension since there was no full-time or light duty position available to Officer Rhoads.

In *Danko v. Board of Trustees of City of Harvey Pension Board*, 240 Ill.App.3d 633, 608 N.E.2d 333 (1st Dist. 1992), the appellate court concluded that the board's decision to deny plaintiff a disability pension because there was an established light duty position was against the manifest weight of the evidence. Specifically, the appellate court, in

Danko v. Board of Trustees of City of Harvey Pension Board, on pages 647 and 648, states:

> Ultimately, however, we hold that there is no established full time light duty position in the City of Harvey police department and, if there is such a position, it was created solely for the purpose of depriving plaintiff of his pension.
>
> ***
>
> As the trial judge noted, the light duty position of "Police Officer Assigned To Station Duties" was created soon after plaintiff first requested a hearing on his pension. The job description combines the duties of records clerk and radio dispatcher. Both these positions are full time positions which are held by civilians, not by police officers. Additionally, no injured officer has ever been permanently assigned to light duty. Moreover, permanently injured officers, such as plaintiff, are pensioned off. It is clear that in the City of Harvey police department light duty is a temporary, though often indefinite assignment, which officers with relatively minor injuries are assigned to *until* they recover.

The significance of the decision by the appellate court in *Danko v. Board of Trustees of City of Harvey Pension Board* is that unless there is an established full-time light duty position, a non-duty related pension can be neither denied nor revoked.

Furthermore, the importance of the appellate court decision in *Danko v. Board of Trustees of City of Harvey Pension Board* is that it requires an established light duty

position, which does not exist in this matter, even though the appellate court attempted to create such a light duty position, referring to the Calumet City ordinance defining the duties of a chief as being supervisory and administrative, even though the current chief, George Vallis, testified that the rules and regulations and the mission statement of City of Calumet City Police Department state otherwise, which testimony certainly negates the concept of an established full-time light duty position in the City of Calumet City police department.

In *Terrano v. Retirement Board of Policemen's Annuity and Benefit Fund of City of Chicago*, 315 Ill.App.3d 270, 733 N.E.2d 905 (1st Dist. 2000), the Appellate Court concluded that the Board's finding that Officer Terrano was not disabled, as disability is defined in the Pension Code, was against the manifest weight of the evidence, in light of the uncontradicted medical evidence establishing that Officer Terrano's knee injury prevented him from performing the duties of an active police officer, and in the total absence of any evidence of either the existence of a limited duty position within the Department, which could be performed by an individual with Officer Terrano's physical limitations, or that such a position was ever offered to Officer Terrano. *Id.* at 275.

Significantly, the petitioner's contention that his non-duty-related pension cannot be revoked because there is no established light duty position available is supported by the analysis in *Terrano v. Retirement Board of Policemen's Annuity and Benefit Fund of City of Chicago*, on page 276:

> Once the evidence before the Board established that the plaintiff is physically incapable of performing the duties of an active police officer, the

> plaintiff met his initial burden of proving that he is disabled. Had there been evidence introduced that the Department offered the plaintiff a limited duty position, it would have been plaintiff's burden to introduce evidence that he is physically incapable of performing the duties of the position offered, and it would have been the Board's function to resolve the question. However, in the absence of any evidence that such a position was ever offered to the plaintiff, the mere existence of such a position could not support a finding that the plaintiff is not disabled. The opinion in *Peterson* makes it quite clear that it is a firm offer of a limited duty position that could be performed by an individual with the applicant's physical limitations which renders the applicant not disabled within the meaning of the Code despite his inability to perform the duties of an active police officer. See *Peterson,* 54 Ill.2d at 265-66, 296 N.E.2d 721; see also *Thurow,* 180 Ill.App.3d at 691-92, 129 Ill.Dec. 471, 536 N.E.2d 155. Unlike the facts in *Peterson* and *Thurow,* the Board in this case did not find that a limited duty position was made available to the plaintiff. *Peterson,* 54 Ill.2d at 262, 296 N.E.2d 721;*Thurow,* 180 Ill.App.3d at 691, 129 Ill.Dec. 471, 536 N.E.2d 155. In point of fact, the Department's records reveal that no such position was offered to the plaintiff from June 24, 1997, the date of Dr. Silver's report which placed the Department on notice that the plaintiff could work within certain physical limitations, and September 19, 1997, the date that the plaintiff's employment with the Department was terminated.

The rationale and analysis of the circuit court further supports the petitioner's assertion that his disability pension could not be revoked as there was no light duty

available. As the basis for its decision to reverse the respondent's revocation of the petitioner's disability pension benefits as contrary to law, the court observed, at App. 25-27:

> There is, of course, only one Chief of the police department, and that position has been filled. Petitioner argues that if he cannot in fact be returned to his position because it is unavailable, then it would be meaningless to determine that because he is physically able to function in that position he is no longer disabled, and that therefore he must be deemed still disabled and entitled to benefits. He cites to *Thurow v. Police Pension Bd. of the Village of Fox Lake,* 180 Ill.App.3d 683 (2d Dist. 1989). In that case the medical evidence was that the police officer could do light duty, but there had been no evidence that light duty was available in the department. Following a procedure approved in *Peterson v. Bd. of Trustee of the Firemen's Pension Fund of the City of Des Plaines,* 54 Ill.2d 260 (1973), the court remanded for the Board to determine whether a light duty position was available and with orders to reverse the termination of benefits if none were. Petitioner also cites *Danko v. Bd. of Trustees of the City of Harvey Pension Bd.,* 240 Ill.App.3d 633 (1st Dist. 1992). Like *Thurow,* the court in *Danko* cited to *Peterson* and reversed a termination of benefits, this time on a determination that there was not a *bona fide* light duty position available. To similar effect is *Terrano v. Retirement Bd. of the Policemen's Annuity and Benefit Fund of the City of Chicago,* 315 Ill.App.3d 270 (1st Dist. 2000). In that case the appellate court was quite clear:

> An individual may be physically incapable of performing the duties of an active police officer and yet not be disabled within the meaning of the Code if a position is made available to him within the police department which can be performed by a person with his physical limitations. In the absence of any evidence that such a position was ever offered to the plaintiff, the mere existence of such a position could not support a finding that the plaintiff is not disabled. 315 Ill App 3d at 275-76.
>
> ***
>
> *Iwanski v. Streamwood Police Pension Bd.*, 232 Ill.App.3d 180 (1st. Dist 1992), involved a situation similar to the one at bar, in that the police officer was discharged after he applied for disability benefits. The issue in the case was whether he was still eligible for benefits despite this discharge. The court answered in the affirmative. There was no light duty element to this case, so there was no need to determine whether any such thing was available; the pensioner had been fired, and would not be taken back. The court held he was nonetheless entitled to disability benefits. (C719-C721).

For purposes of emphasis, citing the *Iwanski v. Streamwood Police Pension Board* language:

> There was no light duty element to this case, so there was no need to determine whether any such thing was available; the pensioner had been fired, and would not be taken back. The court held he was nonetheless entitled to disability benefits.

CONCLUSION

For the above-stated reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

October 6, 2004

Mr. Stanley H. Jakala
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No. 98690 - Steven Rhoads, petitioner, v. Board of Trustees of the City of Calumet City Policemen's Pension Fund, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 2004.

FOURTH DIVISION
May 20, 2004

No. 1-03-2012

Steven A. Rhoads,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County.
	)	
v.	)	
	)	No. 02 CH 7479
The Board of Trustees	)	
Of The City of Calumet	)	
City Policemen's Pension Fund,	)	Honorable
	)	**Nancy J. Arnold,**
Defendant-Appellant.	)	Judge Presiding.

JUSTICE THEIS delivered the opinion of the court:

Defendant Board of Trustees of the City of Calumet City Policemen's Pension Fund (the Board) appeals from an order of the circuit court which, on administrative review, reversed the Board's decision to revoke plaintiff Steven A. Rhoads' not-on-duty disability pension. On appeal, the Board argues that (1) the trial court lacked jurisdiction to review Rhoad's complaint when Rhoads failed to name parties of record as defendants under section 3-107(a) of the Administrative Review Law (735 ILCS 5/3 -107 (a) (West 2000)); and (2) the trial court erred in finding that Rhoads was entitled to a disability pension because his former position of chief of police was not available despite the fact that Rhoads was discharged from that position. For the following reasons, we reverse the decision of the circuit court and affirm the Board's ruling.

Rhoads received his appointment as chief of police of the City of Calumet City on May 24, 1988. On May 11, 1993,

Rhoads submitted his application for a line-of-duty disability pension. On May 13, 1993, Rhoads was terminated from his position as police chief when a new mayor was elected. He did not contest his discharge. The City of Calumet City Police Pension Board denied his application for a line-of-duty disability pension, but granted Rhoads a not-on-duty disability pension under section 3-114.2 of the Illinois Pension Code (the Code) (40 ILCS 5/3-114.2 (West 1994)) on January 31, 1995, as a result of an injury to his left knee. Rhoads then filed a complaint for administrative review, and the circuit court reversed the Board's decision and granted Rhoads a line-of-duty disability pension. The Board appealed to this court, which reversed the decision of the circuit court and found that the Board's decision to grant Rhoads a not-on-duty pension was not against the manifest weight of the evidence. Rhoads v. Board of Trustees of the City of Calumet City Policemen's Pension Fund, 293 Ill. App. 3d 1070, 689 N.E.2d 266 (1997).

In 2001, the Board held administrative hearings under section 3-116 of the Code (40 1LCS 5/3-116 (West 2000)) to determine whether Rhoads continued to be disabled and, thus, could continue to receive a not-on-duty disability pension; or whether Rhoads had recovered sufficiently and was able to resume the duties of his position, necessitating the termination of his disability pension. Richard Cyr testified that the Board's attorney hired him as a private investigator to take video surveillance of Rhoads working as a rodeo clown in 1998. He stated that he videotaped Rhoads on five different occasions for a total of five hours. Cyr testified that he did not edit the film, but only taped portions of each rodeo when Rhoads was performing. He did not see any chiropractors at the rodeos and stated that Rhoads did not limp or have a problem climbing in and out of the barrel. Cyr identified Exhibit H as the videotape he took at the Danville rodeo on July 18,1998, which was then offered into evidence and viewed by the Board.

Ray Cox testified for Rhoads that he owns a rodeo school. He stated that he hired Rhoads as a comic clown or a funny man but testified that Rhoads could not be a bull fighter clown because be had bad knees. He did not have chiropractors at his rodeos. Rhoads worked for Cox approximately 25 to 28 times between 1998 and 2001. Cox saw Rhoads limp before and after performances and observed Rhoads ice his knees when they were swollen. The July 18, 1998 rodeo was not one of Cox's rodeos. Georgia Knotts testified for Rhoads that she was a nurse who provided ice to performers at rodeos. She saw Rhoads perform at a rodeo in 1998 and gave him ice for his knees, but never saw a chiropractor work on him. She stated that Rhoads did not perform during the entire rodeo and placed ice on his knees between performances. Knotts also observed him with a limp and stated that he wore braces on his knees during performances.

George Vallis, chief of police of the City of Calumet City police department testified that he held that position since May 1995. In July or August of 2001, Vallis told Rhoads that there were no full-time or permanent light-duty positions available in the police department. He stated that the chief of police serves at the pleasure of the mayor and could be fired at any time. His position, for the most part, was executive, managerial and administrative. Vallis testified that the mission statement of the department stated that he must be able to perform the duties of a patrol officer. Vallis testified that Rhoads could not return as chief of police.

Rhoads testified that he started "Christian clowning" in 1989 and began working as a comedy clown in rodeos in 1993. He stated that his knees tightened up and he was in pain and used chiropractors when they were available at rodeos. He also iced his knees on a regular basis. In 1998, Rhoads was involved in between 20 and 25 rodeos. At the rodeos, he interacts with children, does Gospel magic

tricks and entertains the crowd. He stated that he performed in fewer rodeos in 1999, 2000 and 2001 because he did not have the physical capacity to do that many shows. Rhoads stated that he could do light-duty work at the police department, but could not respond as a police officer because of his physical limitations. He stated he can no longer perform at rodeos as he did in the videotape due to his knee and back problems, but he admitted that he was on the videotapes.

Dr. William Malik's report dated June 22, 1999, was admitted into evidence. In that report, Dr. Malik indicated that he evaluated Rhoads that day and found him to have chondromalacia of the left knee and degenerative disease in his back. Based on Rhoads' knee and back problems, he would be disabled from full-duty employment as a police officer. In a letter dated March 6, 2000, Dr. Malik amended his prior report and stated that Rhoads could return to full-duty employment as a supervising law enforcement officer, which would consist of medium workload activities. Rhoads could lift up to 50 pounds and could perform frequent lifting and carrying of up to 25 pounds. In his report dated March 29, 2001, Dr. Robert Miller diagnosed Rhoads with chondromalacia of the left knee and stated that he was disabled with respect to that knee. He stated that his disability was relative and prevented him from performing the duties of an ordinary police officer, but was not so severe as to preclude him from working in an administrative position in a police department or prevent him from functioning "perfectly well administratively as a police chief."

In its decision dated March 12, 2002, the Board made the following factual findings. By ordinance, the chief of police of the City of Calumet City is appointed and can be removed by the mayor. In 1998, an investigative firm took video surveillance of Rhoads performing as a rodeo clown on five different occasions in order to ascertain whether

his employment and physical activities since receiving his disability pension were inconsistent with his receipt of the pension. The Board found Cyr's testimony relevant, probative and credible and determined that the video showed Rhoads running, jumping, climbing fences, dancing, running from bulls, leaping on top of and off a barrel, climbing into a barrel, carrying the barrel and being rammed by a bull while crouched inside the barrel. Rhoads did not dispute that he performed these activities and the Board found that these activities were "totally contradictory" to Rhoads' claim of continuing disability to his left knee and his claim that he was presently disabled from performing the duties and functions of chief of police. Dr. Malik's report indicated that Rhoads would be disabled from full-duty employment as a police officer, but Rhoads could return to full-duty employment as a supervisory law enforcement officer. Dr. Miller stated that Rhoads could function perfectly well administratively as a police chief. Rhoads did not introduce any current medical reports that would indicate he was still disabled and unable to perform the duties of the City of Calumet City police chief.

Cox testified that putting a clown in a barrel with a charging bull was a dangerous stunt and that the barrels weighed between 90 and 120 pounds. While Cox testified that Rhoads "gets into a barrel like an old man," the Board stated that it observed Rhoads jumping in and on top of these barrels as well as carrying these barrels with no apparent difficulty. The Board found that the videotape was not altered or edited and accurately portrayed Rhoads performing various rodeo activities. The Board was not persuaded by Rhoads' testimony and found his demeanor to be "unpersuasive, uncorroborated and not credible in light of the videotapes." The Board additionally found that the video "clearly demonstrate[d]" that Rhoads was not disabled from performing his duties as chief of police.

The Board concluded that the doctors who examined Rhoads indicated that he was physically able to perform

the police duties that he previously performed which were administrative in nature and Rhoads offered no competent medical evidence to contradict these reports. The Board also found that "[w]hat position the City of Calumet City has for Steven A. Rhoads is not relevant to whether or not he is disabled." The Board terminated Rhoads' not-on- duty disability pension and ordered a certificate to issue stating that Rhoads was no longer disabled and was able to resume the duties of his position.

Rhoads filed a complaint for administrative review in the circuit court, naming as defendants the Board, the City of Calumet City and Vallis. Rhoads argued that the Board's decision was against the manifest weight of the evidence and that he should have been offered a light-duty position when the Board determined that he was fit for such work. All parties then filed motions to dismiss. The participants and beneficiaries of the pension fund also filed a motion to dismiss, which the Board adopted, contending that Rhoads failed to name them as defendants in the administrative review action and thus, pursuant to section 3-107(a) of the Administrative Review Law, Rhoads' complaint had to be dismissed. On October 31, 2002, the trial court dismissed the City of Calumet City and Vallis, but found that the participants and beneficiaries had no standing to bring a motion to dimiss and struck their motion. The court then denied the Board's motion to dismiss for failure to name the participants and beneficiaries of the pension fund.

Following a hearing, the court found that the Board's factual findings were explicit, appropriately related to Rhoads and adequately supported by the evidence and rejected Rhoads' argument that the decision terminating Rhoads' not-on-duty disability pension was against the manifest weight of the evidence. However, the trial court reversed the Board, finding that Rhoads should continue to receive a disability pension because his previous position of police chief had not been made available to him,

despite the fact that he had been discharged from that position. The Board then filed this timely appeal.

The Board first argues that the trial court erred in denying its motion to dismiss Rhoads' complaint. It contends that the court lacked jurisdiction over the complaint when Rhoads failed to name the participants and beneficiaries of the pension fend as defendants under section 3- 107(a). The Board cites several instances in the record where it indicated that Richard Puchalski was appointed special counsel to represent the interests of the participants and beneficiaries of the pension fund and, thus, argues that they were parties of record to the proceedings before the administrative agency and were required to be named in the complaint.

A motion to dismiss under section 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619 (West 2000)) admits the legal sufficiency of the plaintiff's claim but asserts certain defects or defenses outside the pleading that defeat the claim. Wallace v. Smyth, 203 Ill. 2d 441, 447, 786 N.E.2d 980, 984 (2002) Our standard of review is *de novo*. Wallace, 203 Ill. 2d at 447, 786 N.E.2d at 984.

> Section 3-107(a) of the Administrative Review Law provides in relevant part:
>
> "[I]n any action to review any final decision of an administrative agency, the administrative agency and all persons, other than the plaintiff, who were parties of record to the proceedings before the administrative agency shall be made defendants." 735 ILCS 5/3-107(a) (West 2000).

The consequence for a plaintiff's failure to name a party of record is the dismissal of his complaint. Veazey v. Baker, 322 Ill. App. 3d 599, 604, 749 N.E.2d 1060, 1063 (2001).

In this case, the participants and beneficiaries of the pension fund were not parties of record to the administra-

tive proceedings under section 3-107 and did not need to be named as defendants. We find Thurow v. Police Pension Board, 180 Ill. App. 3d 683, 536 N.E.2d 155 (1989), instructive. In Thurow, this court held that the pension board had the authority to appoint independent counsel to conduct the examination of witnesses and present evidence. The court additionally agreed with the pension board's practice of having one attorney to represent the pension board, another independent attorney to act as the prosecutor by examining witnesses and presenting evidence and a third attorney to represent the police officer. Thurow 180 Ill. App. 3d at 689, 536 N.E.2d at 159.

Here, while the administrative record occasionally states that Puchalski was appointed to represent the participants and beneficiaries of the pension fund, Puchalski later explained the true nature of his role in the proceeding. By referencing this holding in Thurow, he explained that:

> "I have been appointed special counsel to represent the Pension Board in the presentation of evidence concerning the disability of Steven Rhoads.
>
> Now, the Appellate Court has said that it is appropriate to have two attorneys. I know on most Pension Board cases you don't, but it is appropriate to have two attorneys in certain cases: one to advise the Board, which is what Mr. Pagorek will do, and one to present evidence and examine the witnesses, which is my role in this proceeding today and tomorrow."

Throughout the administrative hearing, Puchalski presented an opening statement, examined witnesses, offered exhibits, and submitted a posthearing brief while Pagorek directed the proceeding and provided legal guidance to the Board. Based on this record, we find that Puchalski acted solely as this second attorney under Thurow to present evidence and examine witnesses. Puchalski's participation did not add an additional party to the administrative

hearing and did not convert the participants and beneficiaries of the pension fund into parties of record. Thus, Rhoads was not required under section 3-107(a) to name them as defendants in his complaint for administrative review and the trial court properly denied the Board's motion to dismiss.

Next, we review the Board's decision to terminate Rhoads' not-on-duty disability pension because he was no longer disabled. In reviewing a final decision under the Administrative Review Law, we review the agency's decision and not the trial court's determination. Martino v. Police Pension Board, 331 Ill. App. 3d 975, 979, 772 N.E.2d 289, 293 (2002). The finding and conclusions of an administrative agency on questions of fact are deemed *prima facie* true and correct and will not be disturbed unless they are against the manifest weight of the evidence. Trettenero v. Police Pension Fund, 333 Ill. App. 3d 792, 801, 776 N.E.2d 840, 849 (2002). The mere fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently will not justify reversal of the administrative findings. Trettenero, 333 Ill. App. 3d at 801-02, 776 N.E.2d at 849. Additionally, it is not the function of the appellate court to reevaluate witness credibility or resolve conflicting evidence. Ulysse v. Lumpkin, 335 Ill. App. 3d 886, 893, 781 N.E.2d 415, 420 (2002). When the issue is one of law only, the agency's decision is reviewed *de novo*. Martino, 331 Ill. App. 3d at 980, 772 N.E.2d at 293.

An officer's disability pension is contingent on his continued disability, and if he recovers from the disability, the Board may revoke his disability pension. Martino, 331 Ill. App. 3d at 981, 772 N.E.2d at 294. Section 3-116 of the Code provides the procedure for determining whether the officer has recovered from his disability and whether that pension may be revoked and states in relevant part:

> "A police officer whose duty is suspended because of disability may be summoned to appear before the board, and to submit to an examination to determine fitness for duty. The officer shall abide by the board's decision. If a police officer retired for disability, except one who voluntarily retires after 20 years' service, is found upon medical examination to have recovered from disability, the board shall certify to the chief of police that the member is no longer disabled and is able to resume the duties of his or her position." 40 ILCS 5/3-116 (West 2000).

After reviewing the transcript of the hearings before the Board, watching the videotape and examining the exhibits, we find that there was sufficient evidence to support the Board's factual findings and decision to terminate Rhoads' disability pension. Both Dr. Malik and Dr. Miller found that while Rhoads continued to be disabled and could not work as an ordinary police officer, his disability did not prevent him from functioning as a supervising law enforcement officer in an administrative position within the police department, such as his former position of police chief. Rhoads presented no contrary medical evidence to indicate that he was unable to perform the duties of chief of police. Additionally, the Board relied heavily on the videotape of Rhoads' activities as a rodeo clown, which the Board determined was not altered or edited. We agree with the Board that the video shows Rhoads running, jumping, climbing fences, dancing, running from bulls, leaping on top of and off a barrel, climbing into a barrel, carrying the barrel and being rammed by a bull while crouched inside the barrel. These activities were inconsistent with his claim of continuing disability to his left knee. The Board made credibility determinations finding Cyr's testimony credible and determining that Rhoads' demeanor was "unpersuasive, uncorroborated and not credible in light of the video-

tapes" and that the doctors' reports and videotape were more credible and persuasive than Rhoads' testimony.

Rhoads argues that he continues to be disabled and could not return to his position as police chief. He cites Vallis' testimony that the mission statement of the police department states that the police chief must be able to function as a police officer and Dr. Miller's and Dr. Mailk's statements that Rhoads could not return to full duty as a police officer as a result of his disability. However, the Board cited the City of Calumet City ordinance which was offered into evidence by Rhoads, describing the duties of the chief of police. See Calumet City Code § 20-6. All the duties outlined in this ordinance are purely supervisory and do not require any physical demands of the police chief or that the chief be able to function as a parol officer. Accordingly, we reject Rhoads' argument. Therefore, we find that the Board's factual findings were adequately supported by the evidence and its decision to terminate Rhoads' disability pension because he was no longer disabled was not against the manifest weight of the evidence.

Lastly, the Board challenges the trial court's decision to award Rhoads a disability pension because his former position of chief of police was not available to him despite the fact that Rhoads was no longer disabled and was discharged from his position. The Board contends that neither section 3-116 of the Code nor case law supports the court's holding that a police officer receiving a disability pension who recovers from his disability can continue to receive a disability pension after he is discharged and cannot be returned to his previous position. Rhoads responds that the Board cannot deny him a not-on-duty disability pension while at the same time not offer him a position with the department.

Under section 3-116 of the Code, as set forth above, the Board has the authority to terminate an officer's disability

pension if the officer is found, upon medical examination, to have recovered from his disability. In that situation, section 3-116 provides that the Board will certify to the chief of police that the member is no longer disabled and is able to resume the duties of his position. 40 ILCS 5/3-116 (West 2000). The statute does not require that a position be available for the officer upon the termination of his disability pension. Additionally, police officers on disability pensions are not subject to recall to active duty upon recovery from their disability. Greenan v. Board of Trustees of the Police Pension Fund, 213 Ill. App. 3d 179, 185, 573 N.E.2d 825, 829 (1991). The Board's certification under section 3-116 "does not require the pensioner be returned to duty, nor does it provide an absolute right to his or her old position." Greenan, 213 Ill. App. 3d at 185, 573 NE.2d at 829. Additionally, the Greenan court found that even though a police officer's resignation from the police department did not bar his right to a disability pension, that officer would not be entitled to a pension if he was not disabled. Greenan, 213 Ill. App. 3d at 187, 573 N.E.2d at 830. The fact that an officer was discharged precludes 'the possibility of any reinstatenent. Freberg v. Board of Trustees of the Firemen's Pension Fund, 128 Ill. App. 2d 369, 374, 262 N.E.2d 22, 25 (1970).

Here, Rhoads, as chief of police, held an appointed position and could be removed at any time by the mayor and was, in fact, discharged from that position. This is not a situation where Rhoads remained employed by the police department and was merely on disability leave while he received his pension. His employment with the department was terminated completely at the time he was discharged on May13, 1993. Under the Code, the Board has the power only to grant or terminate a disability pension based on the officer's ability to perforn his position and has no authority to order the City of Calumet City police department to rehire Rhoads. It is exclusively within the police

department's province to decide whether to rehire Rhoads, and in this case it decided not to. The department's decision does not impact whether Rhoads continued to be disabled and has no bearing on the Board's decision to terminate his disability pension. As the Board correctly noted in its decision, "[w]hat position the City of Calumet City has for Steven A. Rhoads is not relevant to whether or not he is disabled."

We note that neither Rhoads nor the trial court acknowledged the above-quoted language from Greenan and instead relied on several other cases, all of which are distinguishable. These cases all involve the award of a disability pension, not the termination of such a pension, and none of them support Rhoads' claim that he was entitled to a light-duty position with the police department following his termination. In Iwanski v. Streamwood Police Pension Board, the court determined that an officer could receive a disability pension which he applied for while employed with the department despite the fact that he was later discharged. Iwanski v. Streamwood Police Pension Board, 232 Ill. App. 3d 180, 190, 596 N.E.2d 691, 698 (1992). The Iwanski court did not hold that the officer would be entitled to his position upon termination of his disability and, in fact, quoted the above-quoted language from Greenan that the board's certification under section 3-116 did not require the officer to be returned to duty and the officer had no absolute right to his job. Thus, Iwanski is inapplicable.

In Thurow, the court reversed the board's denial of an officer's disability pension because, although the officer was capable of performing light-duty work, the officer testified that he was not offered a light-duty position and the record was insufficient to determine whether such a light-duty position existed. Thurow, 180 Ill. App. 3d at 690-92, 536 N.E.2d at 159-60. The officer in Thurow filed for a disability pension while he was on temporary total

disability leave and was never terminated. Thus, the officer remained employed with the department and could be assigned to another position when his disability pension was terminated. However, in the present case, Rhoads was discharged from his position. See also Peterson v. Board of Trustees of the Firemen's Pension Fund, 54 Ill. 2d 260, 296 N.E.2d 721 (1973) (remanding to the board to determine whether a light-duty position was available where the fireman was capable of performing light-duty work; however, fireman was on a leave of absence from the department during the disability pension proceedings and was never terminated); Danko v. Board of Trustees of the City of Harvey Pension Board, 240 Ill. App. 3d 633, 608 N.E.2d 333 (1992) (reversing the board's decision, finding that the pension board which denied officer a disability pension was biased against the officer and no light-duty position was available; however, the officer remained employed with the department during the disability pension proceedings and was not terminated).

Lastly, Terrano v. Retirement Board of the Policemen's Annuity and Benefit Fund, 315 Ill. App. 3d 270,733 N.E.2d 905 (2000), is also distinguishable. In Terrano the court reversed the board's decision denying the officer disability benefits, finding that he could only perform light-duty work and the department never offered him a light-duty position. The court determined that the police department should have offered the officer a light-duty position between the time when the department learned of his physical limitations and the date that he was terminated when his employment with the department ended. The Terrano court did not hold that the department was required to offer the officer a light-duty position after he was discharged. Therefore, all the cases cited by Rhoads are distinguishable.

Accordingly, we find no legal support for the trial court's decision that Rhoads must continue to receive a disability

pension even though he is no longer disabled and discharged from the department solely because his former position of chief of police was no longer available. Additionally, we find that the Board's decision to terminate Rhoads' disability pension because he is no longer disabled is not against the manifest weight of the evidence.

For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and affirm the Board's decision terminating Rhoads' not-on-duty disability pension.

Circuit court reversed; pension board affirmed.

HARTMAN and GRETMAN, J.J., concur.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT. CHANCERY DIVISION

Steven A. Rhoads,	)	
Petitioner,	)	
	)	02 CH 7479
vs.	)	
	)	**Hon. Nancy J. Arnold**
Board of Trustees of	)	Judge Presiding
the City of Calumet City	)	
Policemen's Pension Fund,	)	
Respondents.	)	

OPINION AND ORDER

THIS CAUSE COMES TO BE HEARD on the Complaint by Petitioner, Steven A. Rhoads, pursuant to 735 ILCS 5/3-101 *et seq.*, for administrative review of the final administrative decision of the Board of Trustees of the City of Calumet City Policemen's Pension Fund ("Board") rendered on March 12, 2002. In that decision, issued after an evidentiary hearing, the Board revoked Petitioner's not-on-duty disability pension on the grounds that he was fit to perform as chief of police. Petitioner requests that this court reverse the Board's revocation of his not-on-duty pension because, he argues, the decision was not factually supported and because the Board denied him his due process rights.

Having reviewed the pleadings and briefs of the parties as well as the administrative record, and having heard oral argument, this court concludes that Petitioner waived his due process argument by not raising it on the administrative level and that the Board's decision was not against the manifest weight of the evidence. For the reasons that follow, the Board's decision is reversed.

Factual Background

Plaintiff Steven A. Rhoads was the police chief of Calumet City. On May 11, 1993 Petitioner applied for disability pension benefits with the Board of Trustees of the City of Calumet City Policemen's Pension Fund ("Pension Board"), citing knee problems. Two days later he was terminated. By ordinance, the Chief of Police is an employee at will who can be removed from office by the mayor. On January 31, 1995 the Pension Board granted Petitioner a "not-on-duty" disability pension pursuant to 40 ILCS 5/3-114.2, at the same time denying him an "on duty" pension under Section 114.1 of that title. This Pension Board determination meant that Petitioner would receive 50% of his salary as pension rather than 65% under an "on duty" disability status. Petitioner appealed this determination, the circuit court reversed, and the appellate court reversed the circuit court, holding that the circuit court had impermissibly reweighed the record evidence. *Petitioner v. Bd. of Trustees*, 293 Ill.App.3d 1070, 1071 (1st Dist. 1997).

Sometime later, the Pension Board learned that Petitioner was employed as a "funny man" rodeo clown, an occupation it felt might be inconsistent with his receiving disability benefits. The Board hired a private investigation company to document Petitioner's work by videotape, which it did. On July 18, 2001 the Pension Board reopened hearings about Petitioner's pension status, and after several hearings, revoked his disability pension. Petitioner asserts that the board's decision was against the manifest weight of the evidence and that he should have been offered a light duty position when the board determined that he was fit for such work.

Applicable Statutory Provisions

Illinois Pension Code

Sec. 3-115. Certificate of disability.

A disability pension shall not be paid unless there is filed with the board certificates of the police officer's disability, subscribed and sworn to by the police officer if not under legal disability, or by a representative if the officer is under legal disability, and by the police surgeon (if there be one) and 3 practicing physicians selected by the board. The board may require other evidence of disability. Medical examination of a police officer retired for disability shall be made at least once each year prior to attainment of age 50, as verification of the continuance of disability for service as a police officer. No examination shall be required after age 50. [40 ILCS 5/3-115]

Sec. 3-116. Examination and emergency service.

A police officer whose duty is suspended because of disability may be summoned to appear before the board, and to submit to an examination to determine fitness for duty. The officer shall abide by the board's decision. If a police officer retired for disability, except one who voluntarily retires after 20 years' service, is found upon medical examination to have recovered from disability, the board shall certify to the chief of police that the member is no longer disabled and is able to resume the duties of his or her position. In case of emergency, a disabled police officer may be assigned to and shall perform such duty without right to compensation as the chief of police or chief officer of the municipality may direct. [40 ILCS 5/3-116]

Calumet City Municipal Code

It shall be the duty of the chief of police to:

(1) Have the management of all matters relating to the police department, its officers and members

(2) Devote his entire time to the discharge of the duties of his office.

(3) Be charged with the preservation of the peace, order, safety and cleanliness of the city, and with the duty of protecting the rights of persons and property; and he shall execute and enforce all ordinances and orders of the city council, the mayor and other officers, in accordance with the ordinance.

(4) Have the care, custody and control of the public property of the department, including all firearms and other equipment and the books and records of said department.

(5) Provide adequate police at every fire and give aid to the fire department by giving alarms in case of fire and in clearing streets or grounds in the immediate vicinity of fire so that the members of the fire department shall not be hindered or obstructed in the performance of their duties.

(6) Take notice of all nuisances, and at all times render necessary assistance to the city officer charged with the duty of the abatement of same, and take notice of all impediments, obstructions and defects in the streets, avenues, alleys and public places and cause the same to be removed, or cause immediate notice thereof to be given to the proper city officer whose duty it may be to take measures in relation thereto according to the ordinance.

(7) Cause to be executed all orders directed to him by the county board of health insofar as they relate to the preservation of the health of the city.

(8) Serve as ex officio marshal and superintendent of police.

(9) To enforce all ordinances containing provisions relating to animals.

Calumet City Municipal Code § 20-6.

Discussion

Manifest Weight of the Evidence

Petitioner contends that the decision by the Pension Board was against the manifest weight of the evidence. The evidence presented at the Board hearing consisted of (1) a surveillance videotape taken by private investigator Richard Cyr showing Petitioner performing as a rodeo clown; (2) testimony of Ray Allen Cox, a rodeo expert; (3) testimony of Georgia Knotts, a registered nurse, acquaintance of Petitioner and rodeo-goer; (4) opinion letters from Dr. William Malik and Dr. Robert A. Miller indicating that they each independently found Petitioner fit for duty as police chief.

The duty of the court on a factual review of an administrative decision is to determine whether the agency's findings of fact are against the manifest weight of the evidence. *Williams v. Sec. of State Merit Comm'n*, 151 Ill.App.3d 1014, 1019 (4th Dist 1986); *Rhoads v. Bd. of Trustees*, 293 Ill.App.3d 1070, 1071 (1st Dist. 1997). In judging the manifest weight of the evidence, the court must take into account section 3-110 of the Administrative Review Act, which states "[t]he findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." 735 ILCS 5/3-110.

It is not the function of the court to reweigh the evidence or to make independent factual determinations, but to determine if the evidence as weighed by the trier of fact supports the findings of that agency. *Williams*, 151 Ill. App.3d at 1019. The agency findings of fact are only contrary to the manifest weight of the evidence when the opposite conclusion is clear from the record. *Id.* The fact that an opposite conclusion may be reasonable or that the reviewing court may have ruled differently does not justify reversal of the administrative findings. *Robbins v. Pension Board of Trustees of the Police Pension Fund of the City of Park Ridge*, 253 Ill.App.3d 525, 536 (1st Dist. 1993). The administrative agency is the judge of the credibility of the witnesses and evidence. Id

The surveillance tape was the focal point of the evidence. The video, taken by Richard Cyr, a private investigator, showed Petitioner performing as a clown at five different rodeos. A segment of tape from one of those events, a July 18, 1998 rodeo in Danville, Illinois, was viewed at the Board's hearing. This videotape showed Petitioner running, jumping, climbing fences, dancing, running from bulls, leaping on top and off a barrel, climbing into a barrel and being rammed by a bull while crouched inside the barrel. In his testimony Petitioner did not dispute that he was the person on the videotape, although he did dispute the characterization that he was "running" in the video.

Most of Petitioner's evidence was aimed at showing that the video did not depict his fitness to be chief of police. First Petitioner attacked the videotape, arguing that Mr. Cyr had never been properly trained as a camera operator, because the videotape did not have "time stamp", and because Mr. Cyr was not aware of the presence of chiro-

practors at one of the rodeos he taped.[1] Petitioner also argues that the videotapes were not accurately portray his actions during the rodeos because they did not include any chiropractor involvement or icing of his knees, and they do not depict the pain that Petitioner testified he was experiencing. It was within the Board's province to receive this evidence and to determine its reliability.

Petitioner offered the non-medical testimony of Georgia Knotts, a registered nurse and acquaintance of Petitioner, to show that he was unfit for duty as police chief. Ms. Knotts testified that Petitioner did indeed perform as a funny man clown at rodeos, but that he took special measures to take care of his knees on performance days.[2] Ms. Knotts testified that Petitioner always wore knee braces when he performed, that she saw Petitioner limp during rodeos and that he regularly iced his knees during and after rodeos. Similarly, Petitioner called Ray Cox, a person very experienced in rodeos and who employed Petitioner occasionally. He testified that Petitioner performed as a "funny man" clown, a job that required significantly less athletic ability than a "bullfighter clown," which requires more running and dodging of bulls in the ring. Mr. Cox also testified that when he saw Petitioner's knees, he knew that Petitioner could never be a bullfighter clown.

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[1] The record does show that there were chiropractors at some of the rodeos that were videotaped; the argument appears to be that because the chiropractors were there, and because Mr. Cyr did not see them, he did not do a complete job of videotaping Petitioner.

[2] The Board did not reference Ms. Knotis' testimony in its findings of fact. However, this court includes it in its analysis pursuant to 735 ILCS 513-110. "The hearing and determination shall extend to all questions of law and fact presented by the entire record before the court."

The Board offered two medical opinion letters opining that Petitioner was fit for duty as a police chief. Dr. William C. Malik wrote two letters that are included in the record. In the first letter, dated June 22, 1999, Dr. Malik gave the opinion that Petitioner "would be disabled from full duty employment as a police officer." (Bd. Ex. C). In Dr. Malik's second letter of March 6, 2000, written after he learned that Petitioner was "employed in a supervisory role and not as an on-the-street police officer," Dr. Malik indicated that Petitioner "would be able to return back to his full duty employment of that as a supervising law enforcement officer" with restrictions on heavy lifting. (Bd. Ex. D). Likewise, Dr. Robert A. Miller wrote a letter over a year later, dated March 29, 2001, stating that "Officer Petitioner is definitely disabled. . . . Disability is relative rather than absolute, and is sufficient to preclude his performing the job of a police officer but are [sic] not so severe that he could not function perfectly well administratively as a police chief." (Bd. Ex. E). Petitioner did not offer any contradicting medical evidence.

Plaintiff cites to several cases in support of his contention that the Board's determination was against the manifest weight of the evidence. For example, he cites *Martino v. Police Pension Bd. of City of Des Plaines*, 331 Ill.App.3d 975, 980 (1st Dist. 2002), in which the First District affirmed the circuit court's determination that the pension board had erred in revoking a non-duty disability pension on the grounds that the officer in question was working full-time as a police officer in another town. In that case there had been a finding that the officer was fit to work as an officer in the second police job, where the hiring department was willing to accommodate his disability, but not in the more rigorous first (for which the officer was receiving his disability benefits). The court noted that if the situation had been different and "if the officer's work in the second police department demonstrated his recovery

from the disability that necessitated his termination from the first police department [then allowing him to receive non-duty disability pension would be against public policy]."

Petitioner also cites to *Antonelli v. Board of Trustees of the Hillside Police Pension Board*, 287 III. App. 3d 348 (1st Dist. 1997). In that case, the appellate court held that a police pension board's decision to terminate disability benefits was not against the manifest weight of the evidence where there were conflicting medical opinions from five different doctors as to whether the officer could return to work. In the instant case, there were no conflicting medical opinions. Each of the doctors who rendered opinions after having seen the tape opined that Petitioner was fit to return to his job as police chief, and Petitioner did not offer any contrary medical opinion.

Petitioner argues that the Board's findings that he is fit for duty as police chief is against the manifest weight of the evidence because the "mission statement" of the department says that the chief must be able to perform all the functions of a police officer. In its findings the Board relied on section 20-6 of the Calumet City Code of Ordinances, which describes the duties of the Chief of Police. This ordinance has been set out above. It is clear that the ordinance describes what is purely a supervisory position. The Board's findings were explicit, appropriately related to the Petitioner, and adequately supported by the evidence. Accordingly, the Petitioner's argument that the Board's decision was against the manifest weight of the evidence must be rejected. See *Robbins*, 253 fll.App.3d at 536.

ISSUE OF LAW

There is, of course, only one Chief of the police department, and that position has been filled. Petitioner argues

that if he cannot in fact be returned to his position because it is unavailable, then it would be meaningless to determine that because he is physically able to function in that position he is no longer disabled, and that therefore he must be deemed still disabled and entitled to benefits. He cites to *Thurow v. Police Pension Bd. of the Village of Fox Lake*, 180 Ill.App.3d 683 (2d Dist. 1989). In that case the medical evidence was that the police officer could do light duty, but there had been no evidence that light duty was available in the department. Following a procedure approved in *Peterson v. Bd. of Trustee of the Firemen 's Pension Fund of the City of Des Plaines*, 54 Ill.2d 260 (1973), the court remanded for the Board to determine whether a light duty position was available and with orders to reverse the termination of benefits if none were. Petitioner also cites *Danko v. Bd. of Trustees of the City of Harvey Pension Bd.*, 240 Ill. App.3d 633 (1st Dist. 1992). Like *Thurow*, the court in *Danko* cited to *Peterson* and reversed a termination of benefits, this time on a determination that there was not a *bona fide* light duty position available. To similar effect is *Terrano v. Retirement Bd. of the Policemen's Annuity and Benefit Fund of the City of Chicago*, 315 Ill. App. 3d 270 (1st Dist. 2000). In that case the appellate court was quite clear:

* * * *

> An individual may be physically incapable of performing the duties of an active police officer and yet not be disabled within the meaning of the Code if a position is made available to him within the police department which can be performed by a person with his physical limitations. . . .
>
> * * * *
>
> In the absence of any evidence that such a position was ever offered to the plaintiff, the mere existence of such a position could not support a finding that the plaintiff is not disabled. 315 III App 3d at 275-76.

Iwanski v. Streamwood Police Pension Bd., 232 Ill.App.3d 180 (lst.Dist. 1992), involved a situation similar to the one at bar, in that the police officer was discharged after he applied for disability benefits. The issue in the case was whether he was still eligible for benefits despite this discharge. The court answered in the affirmative. There was no light duty element to this case, so there was no need to determine whether any such thing was available; the pensioner had been fired, and would not be taken back. The court held he was nonetheless entitled to disability benefits.

CONCLUSION

In light of the established case law, then, Petitioner is disabled not withstanding his physical ability to function as chief since that position has not been made available to him. Despite having been discharged, he is entitled to continue receiving disability benefits. The decision below must be reversed as contrary to law.

IT IS HEREBY ORDERED THAT the March 15, 2002 decision issued by the Board Of Trustees Of The City Of Calumet City Policemen's Pension Fund revoking Petitioner's pension is reversed.

ENTERED: JUNE 27, 2003

JUDGE NANCY J. ARNOLD